Supreme Court, U.S.
FILED
OCT 14 1999
OFFICE OF THE CLERK

DOCKET NO. 99-481

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

RICHARD ROE, REPRESENTING UNKNOWN EMPLOYEES OF THE PHILADELPHIA DISTRICT ATTORNEY'S OFFICE

Petitioner,

v.

RAYMOND CARTER

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT W. SMALL
Counsel of Record
Suite 200, 1494 Old York Road
Abington, PA 19001
(215) 884-6745

Attorney for Respondent

Of Counsel:
Berlinger & Small

QUESTION PRESENTED

The question presented for review is stated more properly as follows:

Did the Court of Appeals correctly hold that Pennsylvania district attorneys are not immune from suit in federal court under the Eleventh Amendment where:

(a) no portion of any judgment would be paid from state funds;
(b) Pennsylvania's Constitution expressly denominates district attorneys local officials;
(c) Pennsylvania district attorneys are autonomous and in all respects treated as local officials;
(d) Pennsylvania's courts treat district attorneys as local officials;
(e) district attorneys are elected and the office funded locally;
(f) district attorneys have no statewide jurisdiction or policymaking authority;
(g) the offending conduct involves only administrative, not prosecutorial functions; and
(h) the court below applied in fact, if not by name, the analysis set forth in *McMillian v. Monroe County, Alabama*, 520 U.S. 781 (1997)?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

Factual Background 1

Decision Below 2

REASONS FOR DENYING THE WRIT 2

Consistent With *McMillian*, The Third Circuit Examined the Conduct At Issue 3

Consistent With *McMillian*, The Third Circuit Analyzed Pennsylvania Law 5

There Is No Conflict Among The Circuits 8

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Carter v. City of Philadelphia, 181 F.3rd 339 (3rd Cir. 1999) 3

Chalfin v. Specter, 233 A.2d 562 (Pa. 1967) 7

Commonwealth v. Schab, 383 A.2d 819 (Pa. 1978) 8

Franklin v. Zaruba, 150 F.3d 682 (7th Cir. 1998) 8

Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30 (1994) 8

Hudson v. City of New Orleans, 174 F.3d 677 (5th Cir. 1999) 8, 9

Laidley v. McClain, 914 F.2d 1386 (10th Cir. 1990) 9

Lake County Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) 4

MacElree v. Chester County, 667 A.2d 1188 (Pa. Cmwlth. Ct. 1995) 6

McMillian v. Monroe County, Alabama, 520 U.S. 781 (1997). ..... i, 2-6, 8-10

Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978) 9

Owens v. Fulton County, 877 F.2d 947 (11th Cir. 1989) ... 9

Pennsylvania Gamefowl Breeders Association v. Commonwealth of Pennsylvania, 551 A.2d 361 (Pa.Cmwlth.1988) 7

Schroeck v. Pennsylvania State Police, 362 A.2d 486 (Pa.Cmwlth. 1976) 7

STATUTES AND RULES

Federal Statutes And Rules

Supreme Court Rule 10 4

42 U.S.C. §1983 ..... 2, 5

State Constitution and Statutes

16 P.S. §1401(g) 6

16 P.S. §§11651-11682 6

42 Pa.C.S.A. §102 6

42 Pa.C.S.A. §8501-8528 6

71 P.S. §732-204(c) 6

71 P.S. §732-205 (a)(3)-(5) 6

71 Pa.C.S.A. §§5101-5956 6

Pennsylvania Constitution, Article IV 5

Pennsylvania Constitution, Article IX 5, 7

Pennsylvania Constitution, Article VI, Section 7 5

STATEMENT OF THE CASE

Factual Background

In February 1988, Respondent was convicted of first degree murder and sentenced to life imprisonment without possibility of parole. The only evidence linking Respondent to the crime was the supposed eyewitness testimony of a police informant. The informant was produced months after the crime occurred by a police officer having no connection to the unit charged with investigating the murder or the district where the crime occurred. Respondent's conviction was overturned and the charges nol-prossed by Petitioner because the police officer paid the witness to testify, before and after her testimony. By the time of his release, Respondent had spent ten years in prison for a crime he did not commit.[1]

Respondent's action against Petitioner is premised on her failure to establish training, supervision and disciplinary policies which would have required assistant district attorneys to determine if the police had paid an informant for testimony and, if so, to either not use the informant as a witness or disclose the payment.

---

[1]In an effort to have this Court believe that Respondent committed the crime, Petitioner suggests the existence of a new deposition witness to whom Respondent supposedly has confessed. [Petition for Writ of Certiorari p. 3, n.2.] The propriety of this assertion is questionable given that the deposition to which Petitioner refers is not part of the record in the Court below. Respondent will resist reference to the cross-examination of that witness lest he engage in the same impropriety. That the District Attorney herself does not believe this new witness is apparent from the fact that she has made no attempt to retry Respondent.

Decision Below

The Third Circuit focused on the conduct alleged to give rise to Respondent's injuries and determined that conduct to be administrative in nature, unrelated to Petitioner's core prosecutorial functions. It examined Pennsylvania's Constitution, statutes and common law to determine how Pennsylvania views its district attorneys and unanimously held that, when performing these purely administrative functions, Pennsylvania district attorneys are local officials not entitled to Eleventh Amendment immunity. The court declined *en banc* review.

REASONS FOR DENYING THE WRIT

Petitioner seeks review because the Third Circuit did not cite *McMillian v. Monroe County, Alabama*, 520 U.S. 781 (1997). *McMillian* held that, in determining whether an individual is a state official (and thus not a "person" amenable to suit under 42 U.S.C. §1983), focus is to be on how state law views the particular conduct alleged to cause harm rather than a categorical view of the office held. The Third Circuit carefully examined the conduct at issue through the prism of Pennsylvania law and concluded that Pennsylvania district attorneys are local officials when establishing policies related to the training and supervision of assistant district attorneys. Thus, there is no conflict between *McMillian* and the holding below.

Nor is there a split of authority among the courts of appeals as Petitioner suggests. Although courts have differed over whether district attorneys are state or local officials, the differences do not result from any disagreement over the applicable legal standard. Rather, they result from the different

conduct at issue or the status of district attorneys under the laws of different jurisdictions. "[S]ince it is entirely natural that both the role of [district attorneys] and the importance of counties vary from State to State, there is no inconsistency created by court decisions that declare [district attorneys] to be county officers in one State, and not in another." *Id.* at 795 (footnote omitted)

Consistent With *McMillian*, The Third Circuit Examined the Conduct At Issue

As in *McMillian*, the Third Circuit rejected the notion that district attorneys should be viewed categorically as state officials for Eleventh Amendment purposes merely because a portion of their duties constitutes law enforcement. Instead, the court focused on the particular conduct alleged to have caused Respondent's injury:

> [I]t appears that the *function complained of here,* is not prosecutorial, but administrative: it involves local policies relating to training, supervision and discipline, rather than decisions about whether and how to prosecute violations of state law. Therefore, even if a member of the Philadelphia District Attorney's Office were deemed a state actor with respect to prosecutorial functions, she would nevertheless be a local policymaker *with respect to the conduct at issue here. Carter v. City of Philadelphia*, 181 F.3rd 339, 353 (3rd Cir. 1999) (emphasis supplied)

Petitioner's thesis that all policies of her office constitute "law enforcement" is contrary to the first principle

of *McMillian* because it treats Petitioner in a categorical manner. The Third Circuit faulted the District Court for adopting this "all or nothing" approach rejected by this Court in *McMillian*. ("The District Court similarly equated simply acting in the name of the state with being an arm of the state entitled to share in its sovereign immunity." *Carter*, *supra* at 350)

The determination of whether a district attorney acts as a state or local official is fact-bound. The Third Circuit did not fail to apply the functional analysis of *McMillian*. Rather, it determined that when applied to the facts of this case, a functional analysis compels the conclusion that Pennsylvania district attorneys are local officials when engaging in the administration of their office and the training of their subordinates.

The cases on which Petitioner relies do not hold that Pennsylvania district attorneys are state officials but merely that, when prosecuting crime, district attorneys speak for the Commonwealth. Petitioner's contention that, because she speaks for the state when prosecuting crime, she is a state official for all purposes dehors *McMillian*. See also *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979) (Eleventh Amendment immunity not applicable merely because a "slice of state power" is exercised.)

Stripped of its characterization of the opinion below, the Petition contends only that the Third Circuit made an erroneous factual finding or misapplied a properly stated rule of law. The contention is wrong but, if correct, would not merit review by this Court. [S.Ct. Rule 10]

Consistent With *McMillian*, The Third Circuit Analyzed Pennsylvania Law

McMillian considered Alabama's Constitution, statutes and common law to determine if Alabama sheriffs were state or local officials for purposes of 42 U.S.C. §1983. The Third Circuit engaged in an identical analysis regarding district attorneys under Pennsylvania law.

There is no provision of Pennsylvania's Constitution which deals with local district attorneys as state officials. Pennsylvania's Constitution expressly denominates district attorneys local officials while identifying its Attorney General, who is selected by state-wide election, as a state official. The office of Attorney General is created in Article IV entitled "The Executive," whereas district attorneys are created in Article IX entitled "County Government." The Attorney General has no authority to replace a local prosecutor. [Pennsylvania Constitution, Article VI, Section 7.] District attorneys have no policymaking authority or jurisdiction outside their respective counties.

Petitioner seeks to avoid the emphasis *McMillian* placed on provisions of a state's constitution by arguing that the local election and limited jurisdiction of district attorneys is not a meaningful statement as to their status as state or local officials. *McMillian*, however, recognized that local election and limited geographical authority are factors having "force" in determining whether an individual is a local or state official for §1983 purposes. *Id.* at 792. In *McMillian*, the Court found these factors counterbalanced by other considerations. The Third Circuit found the other considerations to be absent here.

The Third Circuit also scrutinized relevant Pennsylvania

statutes.

Pennsylvania district attorneys are elected and their office funded locally. The Attorney General has no authority to supervise district attorneys who are free to set their own policies as to what crimes will receive attention, how prosecutions will be effectuated, the use of plea bargains or the seeking of the death penalty. The Attorney General has no authority to supercede a local prosecutor generally and only narrow authority to supercede in any particular prosecution. [71 P.S. §732-205 (a)(3)-(5)] Unlike Alabama, where sheriffs report to the Governor, Pennsylvania district attorneys are autonomous, not subject to central state control.

Pennsylvania's Judicial Code excludes district attorneys from the ambit of "Commonwealth Government." [42 Pa.C.S.A. §102] Pennsylvania has not cloaked district attorneys with sovereign immunity, which is accorded only to a "Commonwealth Party." [42 Pa.C.S.A. §8501-8528] The Commonwealth has not provided Petitioner with representation in this case as it would be obligated to do if Petitioner were a state official. [71 P.S. §732-204(c)] Significantly, Petitioner has instituted no action in mandamus seeking such representation. Pennsylvania's district attorneys participate in the County Retirement System, [16 P.S. §§11651-11682] whereas the Attorney General participates in the State Employee's Retirement System, 71 Pa.C.S.A. §§5101-5956. See also, *MacElree v. Chester County*, 667 A.2d 1188 (Pa. Cmwlth. Ct. 1995). County commissioners, not the state, determine if local district attorneys are to be engaged full time or part time. [16 P.S. §1401(g)]

As in *McMillian*, the Third Circuit also turned to Pennsylvania common law. Whereas Alabama's Supreme Court

had interpreted Alabama's Constitution and its historical background as evidence of the framers' intent that sheriffs be considered executive officers of the state, the Pennsylvania Supreme Court has held precisely the opposite.

Referring to a substantially similar predecessor of Article IX, Section 4 of the Pennsylvania Constitution, Pennsylvania's Supreme Court stated:

> The aforesaid language of the Constitution of Pennsylvania is, we repeat, crystal clear. It states in the clearest imaginable language that *District Attorneys* are County – not State – officers and in Philadelphia, by virtue of the above-quoted Constitutional provisions and the Home Rule Charter are *City – not State – officers,* and no Procrustean stretch can alter or change or nullify this language. *Chalfin v. Specter*, 233 A.2d 562, 565 (Pa. 1967), emphasis in original.[2]

Pennsylvania's judiciary has ruled repeatedly that district attorneys are local, not state officers. *Pennsylvania Gamefowl Breeders Association v. Commonwealth of Pennsylvania*, 551 A.2d 361 (Pa.Cmwlth.1988); *Schroeck v. Pennsylvania State Police*, 362 A.2d 486 (Pa.Cmwlth. 1976) (Pennsylvania Commonwealth Court lacks jurisdiction over district attorneys because they are local, not state officials.)

The Third Circuit examined the degree of autonomy

---

[2]While the opinion of Pennsylvania's Chief Justice was not joined in by the other justices, a majority concurred that district attorneys are local, not state, officials.

enjoyed by district attorneys. Such an examination is consistent with *McMillian* because the degree of autonomy is relevant to whether district attorneys are regarded as final policymakers for the state or for local government. The Third Circuit found that Pennsylvania had deliberately designed a local role for its district attorneys. This conclusion is supported by Pennsylvania's Supreme Court. *Commonwealth v. Schab*, 383 A.2d 819 (Pa. 1978).

Petitioner's claim that the Third Circuit rejected *McMillian* disguises an attempt to have this Court substitute its analysis of Pennsylvania law for that of the Third Circuit. This Court repeatedly has declined such invitations and should do so here. *McMillian supra* at 786-87.

There Is No Conflict Among The Circuits

The circuit courts uniformly adhere to this Court's pronouncement that funding is the most salient factor in determining applicability of Eleventh Amendment immunity. *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994), and cases cited therein. Although it was uncertain in *McMillian* which entity would have to pay a judgment, here it is conceded that no state funds could be used to satisfy a judgment against Petitioner. If Petitioner's contention that the Third Circuit failed to apply *McMillian* were correct, her Petition nevertheless should be denied because the funding issue generally is regarded as dispositive of Eleventh Amendment immunity. *Hess, supra*

Likewise, there is no dispute among the circuits that state law is the benchmark for whether an individual is a state or local official. See, e.g. *Hudson v. City of New Orleans*, 174 F.3d 677 (5th Cir. 1999), *Franklin v. Zaruba*, 150 F.3d 682 (7th

Cir. 1998); *Laidley v. McClain*, 914 F.2d 1386 (10th Cir. 1990); *Owens v. Fulton County*, 877 F.2d 947 (11th Cir. 1989). In each case the court looked to how state law viewed the individual.

Finally, the Third and Fifth Circuits have not rejected engaging in an examination of the particular conduct at issue. The Third Circuit very clearly conducted such an examination.

Similarly, the Fifth Circuit did not hold in *Hudson, supra* that the *McMillian* "functional" analysis is never to be applied to Eleventh Amendment determinations. It is doubtful such a holding would be camouflaged in a footnote. It was unnecessary in *Hudson* to apply a functional analysis because the conduct at issue was clearly prosecutorial in nature. If any conduct would render district attorneys state officials, it would be core prosecutorial activity. The Fifth Circuit merely concluded that Louisiana prosecutors are local officials even when engaged in prosecutorial functions.

The issue presented for review is controlled entirely by state law. Although Petitioner is correct that other jurisdictions treat district attorneys as state officials, she is incorrect in concluding that this establishes a split of authority among the courts of appeals. The different conclusions result from different state laws. *McMillian* rejected the notion that each state must treat its corresponding officials in like fashion:

> Petitioner's second concern is that under our holding here, sheriffs will be characterized differently in different States. But while it might be easier to decide cases arising under §1983 and *Monell* [*v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978)] if we insisted on a uniform, national

> characterization for all sheriffs, such a blunderbuss approach would ignore a crucial axiom of our government: the States have wide authority to set up their state and local governments as they wish. Understandably, then, the importance of counties and the nature of county government have varied historically from region to region, and from State to State. [*McMillian* at 795, internal citations omitted]

CONCLUSION

For these reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

ROBERT W. SMALL
Counsel of Record
Suite 200, 1494 Old York Road
Abington, PA 19001
(215) 884-6745

Attorney For Respondent

Of Counsel:
Berlinger & Small

Dated: October 14, 1999